United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7029

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-7029

LEONARD ANDREWS, et al.,	:	
PLAINTIFFS-APPELLANTS	:	Appeal from the United States District Court
v.	:	for the District of Connecticut
EDWARD W. MAHER, Successor to Nicholas Norton, Individually and as Commissioner of Welfare, State of Connecticut, et al.,	:	
	:	The Honorable M. Joseph Blumenfeld,
	:	District Judge
DEFENDANTS-APPELLEES		

BRIEF OF PLAINTIFFS-APPELLANTS

CHARLES A. PIRRO, III
Fairfield County Legal Services Inc.
33 South Main Street
South Norwalk, Connecticut 06854

DAVID B. SPANIER
Legal Aid Society of Hartford County
525 Main Street
Hartford, Connecticut 06103

JAMES C. STURDEVANT
MARY ANN CONKLIN
Tolland-Windham Legal Assistance Program, Inc.
35 Village Street
P. O. Box 358
Rockville, Connecticut 06066

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Swank, 404 U.S. 282 (1971), Carleson v. [illegible]

CONSTITUTIONAL PROVISIONS:

FEDERAL STATUTES

FEDERAL REGULATIONS:

CONNECTICUT STATUTES:

CONNECTICUT REGULATIONS:

the policy creates two classes of needy children receiving

CONGRESSIONAL MATERIALS:

MISCELLANEOUS:

OPINION BELOW

The decision herein appealed from was rendered by Judge M. Joseph Blumenfeld of the United States District Court for the District of Connecticut. The opinion is reported at 385 F. Supp. 672, and is reproduced in the Joint Appendix at pages 31 through 45.

QUESTIONS PRESENTED

1. Whether the complaint challenging Connecticut's AFDC redetermination policy as violative of the Equal Protection Clause of the Fourteenth Amendment presents a substantial constitutional claim to support federal court jurisdiction under 28 U.S.C. §1343(3).

2. Whether the Supremacy Clause claims founded on 42 U.S.C. §1983 and seeking to declare the Connecticut policy violative of the Social Security Act present substantial constitutional claims sufficient to sustain federal jurisdiction under 28 U.S.C. §1343(3).

3. Whether the district court had jurisdiction pursuant to 28 U.S.C. §1343(4) over the statutory claims founded upon 42 U.S.C. §1983 and seeking to declare Connecticut's redetermination policy invalid under the Social Security Act, even absent a substantial constitutional question.

under the Constitution and Laws of the United States so as

STATEMENT OF THE CASE

Nature of the Case

On June 17,1974, plaintiffs-appellants, recipients of public assistance from the State of Connecticut under the Aid to Families with Dependent Children (hereinafter "AFDC") program filed a complaint for Declaratory and Injunctive Relief (A.2) in the United States District Court for the District of Connecticut against defendants-appellees, Nicholas Norton, Commissioner of Welfare of the State of Connecticut (hereinafter "Commissioner") and Henry Boyle, Deputy Commissioner of Welfare of the State of Connecticut (hereinafter "Deputy Commissioner").[1] Plaintiffs on behalf of themselves and all persons similarly situated challenged Connecticut Welfare Department policy provisions, Manual, Vol. I, Index No. 2200, paragraphs four and five at p.2 (eff. June 1, 1974) (Attached to Complaint as Exhibit A) (A.20) which require that all recipients must travel to a designated welfare district office every six months for a face-to-face redetermination of AFDC eligibility.

Specifically, plaintiffs and the class they represent claimed that the State's policy for redetermination of their eligibility has and will subject their families to harsh

---

[1] On or about February 1, 1975, Edward W. Maher succeeded Nicholas Norton as Commissioner of the Connecticut State Welfare Department and at the same time Caroline Perry succeeded Henry Boyle as Deputy Commissioner. Pursuant to Rule 43(c)(1), F.R.App. P., the proceedings should now be in the names of the substituted parties

and threatening circumstances that endanger the well being of themselves and their children. (A.3). Under the state policy scheme in existence at the time of the filing of the complaint,[2] plaintiffs were required to appear for a personal, face-to-face, interview at a local welfare district office for the redetermination of their eligibility for AFDC benefits. (A.20). Plaintiffs were provided no money for transportation for these interviews, nor did their flat-grant reflect a component for this expense. (A.2, 20). Neither day-care nor child-care facilities nor money for such expenses were made available to them for the care of their children while they were required to travel to the local welfare office for their redetermination interviews. (A.2). Moreover, many individual members of the plaintiffs' class have no private transportation available to them, and they reside in areas of Connecticut in which means of public transportation are not readily available to them. (A.2). There exist only a limited number of district offices in the state at which such interviews are conducted. (A.32).

---

[2] Appellees on May 28, 1974 adopted emergency regulations on redetermination. These emergency regulations were filed with the Secretary of State's Office in accordance with The Connecticut Administrative Procedure Act, Conn. Gen. Stat. §4-168(b) (Supp. 1974). Such emergency regulations are effective for not more than 180 days unless an extension of 60 days is requested. More than 180 days have passed since the adoption of these regulations, and no extension has been requested. On October 22, 1974, appellees, in accordance with Conn. Gen. Stat. §4-168(a) published a notice of their intention to adopt formal regulations regarding AFDC redeterminations. These proposed regulations have not been approved by the Attorney General nor the state regulations review committee of the State legislature. The Department of Welfare is currently operating without formal regulations for AFDC redeterminations.

constitutional claim the district court lacked jurisdiction.

All named plaintiffs in this action were required by the defendants to travel extensive distances for their AFDC redeterminations.[3] If plaintiffs did not appear at the designated local district office as required by the defendants their AFDC benefits were summarily terminated unless they requested an evidentiary hearing within ten days of the date of the mailing of the W-848 form (Exhibit C attached to Complaint) (A.22). Since evidentiary hearings are only held at the district offices where the redetermination interviews are held, the recipients face the same problems as those that prevented them from reaching the district office for their redetermination interviews. Because the recipients are similarly unable to travel to the evidentiary hearing,[4]

---

[3]

Andrews	-	36 miles round trip
Barstis	-	43 miles round trip
Britto	-	25 miles round trip
Feltault	-	52 miles round trip
Davis	-	26 miles round trip
Ervin	-	26 miles round trip
Wright	-	40 miles round trip

[4] At the same time that the defendants adopted emergency redetermination regulations, see, note 2, supra, the defendants adopted emergency regulations providing for informal hearings called "evidentiary hearings" which are to be held prior to any proposed suspension, reduction, or discontinuance of assistance. These regulations were filed with the Secretary of State's Office pursuant to Conn. Gen. Stat. §4-168(b), and thereby became effective for 180 days. Subsequently these regulations were extended for an additional 60 days. On October 22, 1974, the Commissioner published notice of his intention to adopt formal evidentiary hearing regulations, 36 Conn. L.J. 19, but has taken no further steps as required by the Connecticut Administrative Procedure Act. As a result no formal regulations have been adopted, the emergency regulations have expired, and the defendants are currently applying their former evidentiary hearings policy.

they are notified that their assistance has been terminated. Under existing departmental policy (Exhibit C to the Complaint) (A.22), a request for a fair hearing pursuant to Conn. Gen. Stat. Section 17-2a does not operate to stay the discontinuance of assistance.

Plaintiffs, individually and on behalf of all other persons similarly situated, raised four distinct causes of action in their Complaint. In the FIRST COUNT they alleged that their constitutional rights guaranteed to them by the Supremacy Clause of the United States Constitution had been violated as a result of a conflict between provisions of the Social Security Act and state regulations and policy concerning the redetermination procedure. Relief was sought under 42 U.S.C. §1983. Specifically, they claimed that the defendants' policy violates: (1) §402(a)(10) of the Social Security Act, as amended, 42 U.S.C. §602(a)(10), which provides that aid to needy families be furnished with reasonable promptness; (2) §406(b)(1) and (2) of the Social Security Act, as amended, 42 U.S.C. §606(b)(1) and (2), which requires that aid to families with dependent children means money payments to meet the needs of the AFDC family unit, and that the defendants by refusing to provide monetary reimbursements incurred by plaintiffs for travel and child-care expenses necessitated by mandatory redetermination interviews placed a restriction upon the use of the assistance grant and thereby imposed an additional condition of continued eligibility; and (3) §402(a)(10) of the Social Security Act, as amended, 42 U.S.C. §602(a)(10), which imposes federal obligations to provide aid to "all eligible persons." (A.12-13,

that offenders aged 16 or 17 should be treated as juveniles

paras. 14-22).

The SECOND COUNT is likewise founded upon the Supremacy Clause of the United States Constitution and 42 U.S.C. §1983. The plaintiffs in the second count asserted that the defendants' redetermination policy conflicts with §402(a)(1) of the Social Security Act, 42 U.S.C. §602(a)(1), and the federal regulations promulgated pursuant thereto which require that a "State Plan for aid and services to needy families with children must (1) provide that it shall be in effect in all political subdivisions of the State." Defendants' failure to provide transportation, child-care services, monetary reimbursement for these expenses, or adequate access to redetermination centers throughout the state while requiring face-to-face redetermination interviews creates a state plan not in effect in all political subdivisions of the State and results in inequitable treatment. (A.14-15, paras. 23-30).

In the THIRD COUNT the plaintiffs alleged that the defendants' redetermination policy is without rational cause or justification and deprives them of rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment in that plaintiffs and all members of their class receive less than the full, state-determined level of AFDC assistance by reason of the defendants' arbitrary allocation of redetermination offices which requires that they expend additional sums of money for travel and child-care expenses as a condition of continued eligibility. (A.15-16, paras. 31-35).

The FOURTH COUNT challenged the defendants' redetermination policy as violative of plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment in that the policy created an irrebuttable presumption that all recipients receive the full amount of the state-determined level of assistance which is contrary to fact. (A.16-17, paras. 36-39).

In their prayer for relief plaintiffs sought to have the District Court convene a three-judge court pursuant to 28 U.S.C. §§2281 and 2284 to declare invalid and permanently enjoin the practice and written policy of the defendants which fail to provide transportation, day-care services, reimbursement for public or private transportation expenses, or the establishment of additional offices of the State Welfare Department to minimize the hardships and burden presently placed upon them in seeking to comply with the redetermination policy of the defendants. Plaintiffs also sought class certification and preliminary injunctive relief. (A.17-19, paras. 1-6).

Hearing and Disposition Below

On June 24, 1974, a hearing was held on plaintiffs' motion for a preliminary injunction. Without notice to the parties to provide them an opportunity to fully brief the issue of jurisdiction, on November 19, 1974, the District Court filed its Memorandum of Decision. 385 F.Supp. 672 (A.31). The court below certified the plaintiffs' class under Fed. R. Civ. P.23(a) and (b)(2), 385 F.Supp., at 676-677 (A.35-36), but dismissed the action for want of a substantial constitutional question. 385 F.Supp., at 677,

681 (A.37, 45).

Judge Blumenfeld's decision that none of plaintiffs' claims were substantial so as to confer jurisdiction under 28 U.S.C. §1343(3) resulted from consideration of only three of their claims, arising out of Counts Three and Four of the Complaint: their equal protection and due process claims. Plaintiffs had also sought relief in Counts One and Two of their Complaint (A.12-15), for deprivation of their constitutional rights based upon conflicts between federal and state law. Without specifically discussing the validity of jurisdiction over these Supremacy Clause claims, Judge Blumenfeld stated simply "that each of plaintiffs' constitutional claims is insubstantial." 385 F.Supp., at 677 (A.37). It is difficult to ascertain whether the District Court, in accordance with previous decisions of this Court, determined that federal jurisdiction does not lie under 28 U.S.C. §1343(3) to consider claims under the Supremacy Clause, and thus did not consider their "substantiality," or whether it considered these claims to be merely statutory claims pendent to plaintiffs' Fourteenth Amendment claims. 385 F.Supp., at 681 (A.45).

On November 29, 1974, the court below entered its Judgment (A.46), denying the motion for a preliminary injunction and dismissing the action.

On December 26, 1974, plaintiffs-appellants filed their Notice of Appeal (R.21, Notice), from the District Court's Judgment of November 29, 1974.

ARGUMENT

SUMMARY OF ARGUMENT

The District Court erred in dismissing plaintiffs' complaint for want of subject-matter jurisdiction. Plaintiffs must only allege a "not insubstantial" constitutional claim to confer jurisdiction on a federal court under 28 U.S.C. §1343(3). The guidelines for determining whether constitutional claims are of sufficient substance to support jurisdiction are well defined by the unbroken line of decisions of the Supreme Court. Unless claims are so attenuated as to be "absolutely devoid of merit, "Baker v. Carr, 369 U.S. 186, 189 (1962), or previous decisions of the Supreme Court have rendered them "inescapably" frivolous, leaving no room for the inference that the questions sought to be raised can be the subject of controversy, the case must be deemed substantial for the purpose of determining the threshold question of jurisdiction. Goosby v. Osser, 409 U.S. 512, 518 (1973); Hagans v. Lavine, 415 U.S. 528 (1974).

Appellants submit that their equal protection claim is not insubstantial for jurisdictional purposes since no decision of the Supreme Court has foreclosed consideration of the precise claim. The challenged redetermination policy operates to create two classes of needy children receiving benefits under Connecticut's Aid to Families with Dependent Children (AFDC) program and imposes deprivation on one of those two classes that lacks rational relation to, and indeed frustrates attainment of, the paramount goal of the Social Security Act, viz., the protection of needy, dependent children. King v. Smith, 392 U.S 309 (1968). In

Connecticut any child in an AFDC family which is unable to comply with the redetermination policy because of the appellees' arbitrary allocation of redetermination offices and which is required to expend additional sums of money for travel and child-care expenses as a condition of continued eligibility is denied the state-determined level of sustenance. Assistance commensurate with the state-determined level of assistance is afforded to all other children. It is this distinction that appellants' argue is "not rationally based and free from invidious discrimination," Dandridge v. Williams, 397 U.S. 471, 487 (1970), and is violative of the equal protection strictures.

The District Court's reliance upon prior Supreme Court decisions regarding territorial uniformity and filing fees are misplaced. The appellants' equal protection claim is premised not upon territorial uniformity, but rather upon the argument that not all needy children are afforded the full amount of the state-determined level of assistance. Similarly, their claim is not forelcosed by the Court's decisions in Ortwein v. Schwab,410 U.S. 656 (1973), and United States v. Kras, 409 U.S. 434 (1973). In Ortwein, the Court rejected plaintiff's equal protection claim in upholding the required filing fee for obtaining judicial review of an adverse welfare hearing decision, reasoning that a hearing held in accordance with Goldberg v. Kelly, 397 U.S 254 (1970), was all that the Fourteenth Amendment required. In Kras, the Court rejected the equal protection claim that the bankruptcy filing fee was discriminatory noting that the fee could be paid in installments over a

period of months. In the instant case, however, there are no alternatives to compliance with the challenged policy. Failure to appear at a scheduled redetermination interview in the designated district office results in the prompt termination of AFDC assistance to the family.

Appellants submit, therefore, that their equal protection claim is not "insubstantial." The court below seemingly disposed of the merits of the equal protection claim under the guise of determining the threshold question of jurisdiction.

Appellants submit that the court below erred in considering their Supremacy Clause claims to be merely pendent statutory claims. Appellants'assertion that Connecticut's AFDC redetermination policy conflicts with the Social Security Act states a constitutional question under the Supremacy Clause. A federal court has jurisdiction over such claims under 28 U.S.C. §1343(3) so long as they are not insubstantial.

Appellants assert that Congress has pre-empted the states' discretion in the areas of eligibility determination and uniformity of administration in the AFDC program. Once a state has elected to participate in the federally-financed welfare scheme, as has Connecticut, it must comply with federal requirements which are expressed in the Social Security Act and H.E.W. regulations. Edelman v. Jordan, 415 U.S 651 (1974); King v. Smith, 392 U.S. 309 (1968). Appellants claim that appellees' redetermination procedures violate the express mandates of the Social Security Act and H.E.W. regulations. The allegation that a state practice conflicts with the Social Security Act in the areas of eligibility determination or statewide uniformity of administration cannot be

(1973), leads us to the inescapable

considered without reference to the Constitution, Townsend v. Swank, 404 U.S. 282 (1971); Carleson v. Remillard, 406 U.S. 598 (1972), and therefore presents a Supremacy Clause claim.

Although the Supreme Court has never explicitly held that federal jurisdiction exists under 28 U.S.C. §1343(3) over ar action whose sole constitutional claim is grounded in the Supremacy Clause, Hagans v. Lavine, 415 U.S. 528, 533 n.5 (1974), appellants contend that the court below had jurisdiction under §1343(3) for several reasons, The Social Security Act provides money and services to needy children. The Supremacy Clause guarantees to such persons the right to receive the benefits mandated by the Act. 42 U.S.C. §1983 provides to such children a cause of action when they are deprived under color of state law of their constitutional right to receive such benefits. Since §1983 provides a cause of action to redress deprivations of both constitutionally secured and statutorily protected rights,it is erroneous to hold that a violation of the Social Security Act presents merely a statutory claim, as did the court below and as did this Court in McCall v. Shapiro, 416 F.2d 246 (2d Cir. 1969). Rather, appellants have alleged a constitutional violation over which federal courts have jurisdiction under 28 U.S.C. §1343(3). Blue v. Craig, 505 F.2d 830 (4th Cir. 1974). Moreover, §1343(3) confers federal jurisdiction over all §1983 actions whether the violations alleged are statutory or constitutional, Lynch v. Household Finance Corp., 405 U.S. 538 (1972), and regardless of whether the rights allegedly violated are personal or property rights. Id.

Appellants' complaint alleging that under color of

state law certain provisions of the Social Security and federal regulations promulgated thereunder are being violated states a cause of action under 42 U.S.C. §1983, and thus confers federal jurisdiction under 28 U.S.C. §1343(4), even absent allegations of constitutional invalidity. Gomez v. Florida State Employment Service, 417 F.2d 569 (5th Cir. 1969); Blue v. Craig, 505 F.2d 830, 842 (4th Cir. 1974). In the instant case, the appellants have satisfied the jurisdictional test by alleging that the appellees' redetermination policy violates the Social Security Act which requires that aid be furnished with reasonable promptness, that aid be furnished to all eligible persons, that the use of the assistance grant not be restricted and that a uniform level of assistance be afforded all eligible persons throughout the state.

I. THE DISTRICT COURT ERRED IN HOLDING THAT APPELLANTS' EQUAL PROTECTION CLAIM WAS INSUBSTANTIAL SO AS TO DEPRIVE IT OF JURISDICTION TO CONSIDER THE CLAIM.

The District Court concluded after a hearing on plaintiffs' motion for a preliminary injunction that it lacked subject-matter jurisdiction under 28 U.S.C. §1343(3) because none of plaintiffs' Fourteenth Amendment claims were "substantial." 385 F.Supp. 672, 677 (A.37). The question presented here is not the ultimate disposition of the constitutional claims raised by the complaint, but rather the threshold question, whether any of those claims are of sufficient substance to support federal jurisdiction.

Appellants presented two basic Fourteenth Amendment claims in their complaint. They challenged; (1) the AFDC redetermination policy of the defendants as violative of the

brought under the Social Security Act. See, e.g., King v.

Equal Protection Clause of the Fourteenth Amendment because the policy creates two classes of needy children receiving benefits under Connecticut's Aid to Families with Dependent Children (AFDC) program. One class is composed of children who have been determined initially eligible for benefits but who receive less than the full level of assistance commensurate with the state-determined level of assistance because the appellees' arbitrary allocation of redetermination offices requires them to expend additional sums of money for travel and child-care costs as a condition of continued eligibility. All other needy children are afforded full assistance commensurate with the state-determined level of assistance. It is this distinction which appellants submit is not "rationally based and free from invidious discrimination," Dandridge v. Williams, 397 U.S. 471, 487 (1970), and therefore, denies the equal protection of the laws; (2) the AFDC redetermination policy is violative of the Due Process Clause of the Fourteenth Amendment because it deprives appellants of statutory entitlements without their being afforded due process of law. The policy creates an irrebuttable presumption contrary to fact, i.e., that all recipients receive the full amount of the state-determined level of assistance. By not permitting recipients to rebut the presumption, the appellees have denied them due process of law. Bell v. Burson, 402 U.S. 535 (1971); Heiner v. Donnan, 285 U.S. 312 (1932).

The district court found both the equal protection and due process claims to be insubstantial as a basis for jurisdiction under 28 U.S.C. §1343(3). Appellants contend

that the court below erred in concluding that the equal protection claim was insubstantial and that the application of the standard for determining whether a substantial question was presented on the allegations contained in the complaint requires a reversal here.

Article III, §2 of the federal constitution provides that "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, . . ." Congress has exercised its power to assign jurisdiction to the district court in 28 U.S.C. §1343(3):

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . [to] redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usuage, of any right, privilege or immunity secured by the Constitution of the United States . . .

42 U.S.C. §1983 creates a cause of action to challenge the conduct of persons who, under color of state law, deprive the claimant of "any rights, privileges, or immunities secured by the Constitution and laws, ..."

Simply stated, "[J]urisdiction is authority to decide the case either way." The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913). In determining the threshhold question of jurisdiction, the court's inquiry is restricted to "whether, upon the allegations of the bill of complaint, assuming them to be true in point of fact, a Federal question is disclosed so as to give the . . . court jurisdiction. . . ." Vicksburg Waterworks Co. v. Vicksburg, 185 U.S. 65, 82 (1902). In determining this jurisdictional question, a court must look

jurisdiction exists for the consideration of Supreme]

to the complaint to ascertain whether it sets forth a claim under the Constitution and Laws of the United States so as to satisfy the requirements of 28 U.S.C. §1343(3).

Jurisdiction is not defeated by the possibility that the pleadings fail to state a cause of action on which the appellants could actually recover.

> For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdicition. Whether the complaint states a cause of action upon which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.
>
> Bell v. Hood, 327 U.S. 678, 682 (1946).

It is now well established that a constitutional claim is insubstantial for the purposes of subject matter jurisdiction only if it is "essentially fictitious" or "wholly insubstantial," Bailey v. Patterson, 369 U.S. 31, 33 (1962), "obviously frivolous," Hannes Distilling Co. v. Baltimore, 216 U.S. 285, 288 (1910), or if "its unsoundness so obviously results from the previous decisions of [The Supreme Court] as to foreclose the subject," Ex parte Poresky,290 U.S. 30, 32 (1933). A constitutional claim of questionable merit, or one rendered doubtful by reason of previous decisions is not insubstantial for the finding of jurisdiction to consider it. Goosby v. Osser, 409 U.S 512, 518 (1973). Put another way, "[d]ismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that claim were 'so attenuated and insubstan-

tial as to be absolutely devoid of merit,' . . ." Baker v. Carr, 369 U.S. 186, 199 (1962) (citation omitted).

Recently in Goosby, supra, the Court articulated the standard to be applied by federal courts in determining whether constitutional claims are substantial. The lower court therein had erroneously determined that the constitutional claim had been rendered insubstantial by an earlier decision. The Supreme Court considered such limiting words as "wholly without merit" and"obviously without merit" in the context of determining the effect of prior decisions upon the substantiality of constitutional claims, and finding them to have particular significance, stated:

> . . . Those words impart that claims are constitutionally insubstantial only if prior decisions inescapably render the claims frivolous; previous decisions which merely render claims of doubtful or questionable merit do not render them insubstantial . . . .
>
> Goosby, supra, at 518.

The doctrine of substantiality was again reviewed in Hagans v. Lavine, 415 U.S. 528 (1974), a case involving a challenge by AFDC recipients to a New York regulation which permitted the state to recoup prior unscheduled payments for rent from subsequent grants as violative of the Equal Protection Clause of the Fourteenth Amendment and the Social Security Act and HEW regulations promulgated thereunder. The district court, finding the equal protection claim to be "substantial" for jurisdictional purposes, declared the recoupment regulation contrary to the Social Security Act and HEW regulations and enjoined its implementation or enforcement. On appeal this Court reversed, holding that

because the recipients had failed to present a substantial constitutional claim the district court lacked jurisdicition to entertain either the equal protection or the statutory claim.

The Supreme Court in Hagans reversed this Court's judgment holding that the district court had jurisdiction under 28 U.S.C. §1343(3) under its previous pronouncements, and noted that "[w]e are unaware of any cases in this court specifically dealing with this or any similar regulation and settling matter one way or the other." 415 U.S., at 539 (footnote omitted); Perez v. Lavine, 378 F.Supp. 1390, 1394 (S.D.N.Y. 1974). Given this standard, appellants maintain that in view of the pertinent case law and the allegations of appellants' complaint which must be accepted as true, Boddie v. Connecticut,401 U.S. 371, 373 (1971); Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960), the court below erred in dismissing the complaint for lack of jurisdiction.

The court below erroneously concluded that prior decisions of the Supreme Court regarding territorial uniformity, see, Missouri v. Lewis, 101 U.S. 22 (1879); Salsburg v. Maryland, 366 U.S. 420 (1961); and McGowan v. Maryland, 366 U.S. 420 (1961), rendered the appellants' equal protection claim insubstantial. If this argument was ever valid, it lost its status as a general principle when the Supreme Court decided Reynolds v. Sims, 377 U.S. 533 (1964), holding that state legislatures could not give more weight to a citizen's vote in one part of the state than in another part of the state. "The true rule today would seem to be that a territorial classification, like any other classification, must pass

muster under the applicable standard of review for equal protection . . . purposes." Manes v. Golden, ___F.Supp. ____, Civil No. 74 C 191 (E.D.N.Y. Dec. 24, 1974), Slip Opinion, at 21-22.

The old case of Missouri v. Lewis, 101 U.S. 22 (1879), relied upon by the District Court, is not controlling for jurisdictional purposes. In Missouri it was held that an intermediate court of appeals might be provided in St. Louis and other urban counties even though other areas of the state had a direct appeal to the Supreme Court of Missouri. Again, factual differences between urban counties and other counties may have afforded a rational basis for this distinction at that time.

McGowan v. Maryland, 366 U.S. 420 (1961), decided by the Supreme Court on the merits, involved an exception from the Sunday closing laws which the Court sustained because the county involved represented the location where sales on Sunday might most promote public convenience. In Salsburg v. Maryland, 346 U.S. 545 (1954), which concerned the application of a different evidentiary rule in gambling cases in the same county, an equal protection challenge was rejected on the merits since the evidence disclosed that the suppression of gambling in the county in question presented particular difficulties. The Court further noted that while "the presumption of reasonableness [for the distinction] is with the State," evidence to the contrary is clearly admissible. Salsburg, supra, at 553; McGowan, supra, at 426.

A territorial disparity was found violative of the Equal Protection Clause in connection with the Baltimore

judicial system, in which Marland had statutorily provided that offenders aged 16 or 17 should be treated as juveniles in all parts of the state with the exception of Baltimore. Long v. Robinson, 316 F.Supp. 22 (D.Md. 1970), aff'd, 436 F.2d 1116 (4th Cir. 1971). Thus, in the cases relied upon by the court below, "the laws were upheld not because territorial classification is immune from review, but because the particular territorial classification was supportable." Manes, supra, slip opinion, at 22-23.

The appellants' equal protection claim is premised not upon territorial uniformity, but rather upon the allegation that not all needy children are afforded the full amount of the state-determined level of assistance. While a similar argument was rejected in a different context by the lower court in Dublino v. New York State Dept. of Social Services, 348 F.Supp. 290 (W.D.N.Y. 1972), rev'd on other grounds, 413 U.S 405 (1973), the court emphasized that:

> The difficulties incident to the semi-monthly check pickup requirement, while probably a harsh burden for many HR recipients . . . , do not on the facts now before the court arise to a denial of equal protection. There is no evidence that the state has singled out those with transportation hardships as targets of a special classification or special treatment.
>
> 348 F.Supp., at 298.

Appellants, therefore, submit that the holding in Dublino does not inescapably foreclose their claim for jurisdictional purposes. Rather, appellants should be afforded an adequate opportunity to refute the presumption that appellees' re-determination policy is reasonable.

Similarly, the equal protection claim in the instant case is not foreclosed by the Court's decisions in Ortwein v. Schwab, 410 U.S. 656 (1973), and United States v. Kras, 409 U.S. 434 (1973). The court below reasoned that in both Ortwein and Kras the imposition of $25 and $50 filing fees respectively were found justifiable by the Court to attain "the goal of offsetting the expenses of maintaining a court system for the benefit of its citizens." 385 F. Supp., at 678 (A.40). In Ortwein, the Court sustained the filing fee required of persons seeking judicial review of adverse welfare decisions in the state's appellate courts holding that there was no absolute right to judicial review of an administrative hearing which met the constitutional requisites of Goldberg v. Kelly, 397 U.S. 254 (1970). Ortwein, supra, at 659-660.

In Kras, supra, the Court held that conditioning a discharge in bankruptcy upon the payment of a $50 filing fee did not violate the Equal Protection Clause. In so holding, however, the Court duly noted that the fee could be paid in installments, that there were alternatives to filing a bankruptcy petition in the discharging of debts, and that the legislative history revealed specific Congressional intent to establish a self-supporting bankruptcy system with paid referees. Kras, supra, at 448-449.

In the instant case there exist no alternatives to strict compliance with the appellees' AFDC redetermination policy requiring a face-to-face interview at a designated district office every six months. Thus the appellants' equal protection claim is distinguishable from the decisions in

Ortwein, supra, and Kras, supra.

Plaintiffs alleged in their complaint that by arbitrarily allocating redetermination offices throughout the State of Connecticut and by refusing to provide the means by which to pay travel and child-care expenses, the defendants have isolated them from access to continued eligibility for AFDC assistance without rational justification. In asserting their equal protection claim appellants concede that the correct standard to be applied is the traditional one enunciated by the Court in San Antonio School District vs. Rodriquez, 411 U.S. 1 (1973). Therein, the Court held that the challenged statutory scheme must be examined "to determine whether it rationally furthers some legitimate articulated state purpose..." 411 U.S., at 17. As Judge Newman emphasized in Henry v. White, 359 F. Supp. 969, 972 (D.Conn. 1973), in denying the defendant's motion to dismiss:

> Where, as here the challenged action is administrative, rather than legislative, it seems especially appropriate to require some indication that an actual, as distinguished from a hypothetical, legitimate state purpose is in fact being advanced.

At the hearing on the motion for a preliminary injunction below the appellees purported to justify their redetermination policy under the guise of administrative convenience. Theresa Connell, Chief of Income Maintenance for the Connecticut Welfare Department, testified at the hearing below that redetermination interviews reflect a "team approach", (A. 49), the team being comprised of five workers. (R. 1, Transcript of Proceedings, at 32, ll. 14-20). On cross-examination,

however, she admitted that where the interview is held in the town in which the recipient resides, only one worker is dispatched to conduct the redetermination. (R. 1, Transcript of Proceedings, at 34, l. 17 through 35, l. 4). Thus, the "team approach" is neither required nor universally applied.[5] In determining the threshold question of jurisdiction, appellants submit that the appellees' purported justification is not determinative.

In Henry, supra, the plaintiffs challenged the Connecticut Welfare Department's closing of their sub-district office in Norwalk claiming that such arbitrary action by forcing Norwalk recipients to travel to Bridgeport violated their rights to the equal protection of the laws. The case was ultimately dismissed on the merits, not for lack of jurisdiction. See, Henry v. White, Civil No. 15,322 (D. Conn. 1974) (unreported oral opinion). Unlike Henry, however, which involved merely the impairment of access of a particular class of welfare recipients to services, the inability of recipients in the instant case to comply with the appellees' redetermination policy causes a far more serious and total deprivation, the termination of eligibility for benefits. As the Court emphasized in Kras, supra, at 445:

> If Kras is not discharged in bankruptcy, his position will not be materially altered in any constitutional sense. Gaining a discharge will effect no change with respect to basic necessities.
>
> (Footnote omitted).

---

[5] The District Court below relied heavily in its decision upon the "reasonableness" of the "informal" 25-mile rule. 385 F.Supp., at 677-678 n. 7 (A. 38). Assuming arguendo the reasonableness of this limitation, it is nowhere stated in either the appellees' extant redetermination policy or in the now extinct emergency regulations, and reliance upon it is therefore misplaced.

The District Court's equation of a loss of total benefits with mere services, 385 F.Supp., at 678 (A. 40), ignores the obvious impact of the redetermination requirement.

At the threshold, the Equal Protection Clause "imposes a requirement of some rationality in the nature of the class singled out." Rinaldi v. Yeager, 384 U.S. 305, 308-309 (1966). The challenged classification in the instant case does not satisfy this standard.

Appellants' children will not be deprived of the state-determined level of sustenance because they are less eligible than their peers receiving benefits under the AFDC program. Indeed, so far as the record discloses, each is indistinguishable from his peers. The total deprivation of the means of minimum sustenance because of inability to afford travel and child-care expenses is an example, not of "rationality," but instead an "arbitrary . . . choice" by which the State provides "dissimilar treatment for [children] who are . . . similarly situated . . ." Reed v. Reed, 404 U.S. 71, 76-77 (1971).

Elaborate argument is unnecessary to establish that the rigid redetermination requirement [6] and the deprivation it

---

[6] With reference to child-care the District Court incorrectly found that appellant Andrews' older children could serve as baby-sitters for the younger children, 385 F.Supp., at 676 (A.34), apparently ignoring Andrews' uncontroverted testimony that his eldest daughter "is slightly retarded." (R.1, Transcript of Proceedings, at 44, l.25).

imposes bears no rational relation to the mandated and "paramount goal of AFDC," providing basic financial protection to needy, dependent children. King v. Smith, 392 U.S. 309, 325 (1968).

It is by far the better course -- certainly from the standpoint of judicial economy -- as Goosby, supra, holds, to forego the doubts, obtain jurisdiction and dispose of the issues on the merits. The logic of this argument is illuminated by the procedural history of Glover v. McMurray, ___ F.2d ___, Docket Nos. 73-1876, 1904, 1906 (2d Cir. Nov. 1, 1974) (per curiam). In Glover, the district court, finding a substantial constitutional question to have been presented, issued an order requiring the defendants to restore day care services to any applicant because of failure to submit a certain form until that form was revised in accordance with the opinion. 361 F.Supp. 235 (S.D.N.Y. 1973). On appeal, one judge dissenting, this Court reversed and remanded the case to the district court with instructions to dismiss for want of jurisdiction because no substantial constitutional question had been raised. 487 F.2d 403 (2d Cir. 1974). The Supreme Court in a per curiam order granted certiorari and remanded the case to this Court for further consideration in light of Hagans, supra. ___ U.S. ___, 42 U.S.L.W. 3691 (1974). On remand this Court reversed its prior decision, stating:

> The test for determining whether a substantial constitutional claim has been presented for § 1343(3) jurisdictional purposes was restated by the Supreme Court in Hagans v. Lavine, supra. The Court's refusal to reexamine the substantiality doctrine in Hagans, and particularly its emphasis upon

> the concept of "constitutional insubstantiality" as reviewed in Goosby v. Osser, 409 U.S. 512, 518 (1973), leads us to the inescapable conclusion that the district court in the instant case did have jurisdiction over the due process claim asserted by plaintiffs and pendent jurisdiction to consider the statutory claims urged by them.
>
> Glover, supra, Slip Opinion, at 3 (footnote omitted).

Appellants therefore assert that their equal protection claim is not "insubstantial." The court below seemingly disposed of the merits of the claim under the guise of determining the threshold question of jurisdiction.

II. THE DISTRICT COURT ERRED IN REFUSING TO ASSUME JURISDICTION UNDER 28 U.S.C. §1343(3) TO CONSIDER APPELLANTS' CLAIM THAT APPELLEES' AFDC REDETERMINATION POLICY CONFLICTED WITH THE SOCIAL SECURITY ACT IN VIOLATION OF TEH SUPREMACY CLAUSE.

Appellants'assertion that Connecticut's AFDC redetermination policy conflicts with the Social Security Act, 42 U.S.C. §401 et seq., raises a Constitutional question under the Supremacy Clause, over which a federal court has jurisdiction pursuant to 28 U.S.C. 1343(3). Section 1343 provides in pertinent part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

Without full discussion this Court has rejected the assertion of jurisdiction under 28 U.S.C. §1343(3) to consider conflicts

between federal and state law. See, McCall v. Shapiro, 416 F.2d 246 (2d Cir., 1969); Rosado v. Wyman, 414 F.2d. 170 (2d Cir., 1969), rev'd 397 U.S. 397 (1970); Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973), cert. denied, 410 U.S. 921 (1973).

The reasons given by this Court in these cases for its refusal to extend Section 1343(3) jurisdiction to conflicts of state and federal law may be summarized as follows:

1. A suit claiming a conflict between state and federal law does not present a constitutional claim.

2. The different wording of 42 U.S.C. §1983 and 28 U.S.C. §1343(3) shows the intent of Congress to give federal courts jurisdiction over suits claiming a violation of the Constitution or of a statute providing for equal rights.

3. The Social Security Act, supra, primarily provides monetary benefits rather than individual rights, and is therefore not a statute providing for equal rights.

4. Extension of §1343(3) jurisdiction to claims under the Social Security Act would open the floodgates to frequent judicial review of State Welfare Department decisions.

A. The Claim That a State Law or Regulation Conflicts with Federal Law in Violation of the Supremacy Clause States a Constitutional Issue.

The Supreme Court has declined to authoritatively decide whether suits challenging state welfare provisions only on the ground of conflict with federal statutes may be brought in federal courts. King v. Smith, 392 U.S. 309, 312, n.3, (1968); Hagans v. Lavine, 415 U.S. 528, 533 n.5 (1974). Despite this reservation, the Supreme Court has consistently accepted, and, thereby, encouraged, the assumption by district

courts of jurisdiction under 28 U.S.C. §1343(3) of cases brought under the Social Security Act. See, e.g., King v. Smith, 392 U.S. 309 (1968); California Department of Human Resources v. Java, 402 U.S. 121 (1971); Rosado v. Wyman, U.S. 397 (1970); Dandridge v. Williams, 397 U.S. 471 (1970); Damico v. California, 389 U.S. 416 (1967); Carleson v. Remillard, 406 U.S. 598 (1972); Carter v. Stanton, 405 U.S. 669 (1972); Townsend v. Swank, 404 U.S. 282 (1971). In most of the above-cited cases, the Supreme Court assumed that jurisdiction existed under §1343(3), or so stated without analysis. Hagans, supra, at 533, n.4.

In those few cases where the Supreme Court has spoken, however briefly, the Court has referred to the Supremacy Clause, Article 6, Clause 2 of the Constitution, as support for the invocation of a constitutional question. Thus, in Townsend v. Swank, 404 U.S. 282, 286 (1971), the Court held:

> King v. Smith establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.
>
> See also, Carleson v. Remillard, 406 U.S. 598 601 (1972); Dublino v. New York State Department of Social Services, 348 F.Supp. 290, 295 (W.D.N.Y. 1972), rev'd on other grounds 413 U.S. 405 (1973); id, juris. aff'd, at 412, n.11; Stoddard v. Fisher, 330 F.Supp. 566, 571-2 (D.Me. 1971)(three-judge Court); C.U.W.E. v. White, 55 F.R.D. 481, 486 (D. Conn, 1972).

In an earlier case in this jurisdiction, Bomar v. Keyes, 162 F.2d. 162 (2d Cir. 1947), cert. denied, 332 U.S. 825 (1947), reh. denied, 332 U.S. 845 (1947), which has never

been reversed, Judge Learned Hand found §1343(3) jurisdiction over a statutory claim which arose under the Judiciary Act, 28 U.S.C. §411 (1940), as amended, 28 U.S.C. §1861 (1970).

An action claiming a conflict between a state law or regulation and the Social Security Act states a constitutional claim, a violation of the Supremacy Clause. Such a claim is jurisdictionally cognizable under §1343(3).

The Supremacy Clause was not discussed in McCall v. Shapiro, supra, Rosado v. Wyman, supra, or Aguayo v. Richardson, supra. In these cases, this Court discussed §1343(3) jurisdiction over essentially statutory claims.
Both the first and second counts of plaintiffs' complaint in the instant case state Supremacy Clause claims. Plaintiffs have not pleaded in these two counts statutory claims which could only be considered as pendent claims to a substantial constitutional claim. Rather, plaintiffs have pleaded substantial claims which must be considered in their own right and not as pendent claims. Therefore, the District Court erred in denoting the first two counts as "pendent statutory claims."[7] 385 F.Supp., at 681 (A.45).

---

[7] Although it is not clear from the District Court's opinion which of plaintiffs' claims are "pendent statutory claims," it appears that the District Court was referring to Counts One and Two. It also appears that the court below has refused to consider the substantiality of plaintiffs' Supremacy Clause claims because of prior decisions of this Court. If so, the court below erred because insubstantiality results only when claims have been foreclosed by decisions of the Supreme Court alone. Hagans v. Lavine 415 U.S. 528, 543 (1974).

Generally, federal courts are concluding that §1343(3) jurisdiction exists for the consideration of Supremacy Clause claims. In Wilson v. Weaver, 499 F. 2d 155 (7th Cir., 1974), the Seventh Circuit found §1343(3) jurisdiction and declared a state policy denying aid to unborn children to be in conflict with the Social Security Act and therefore invalid under the Supremacy Clause. The First Circuit Court of Appeals reached a similar result in Carver v. Hooker, 501 F.2d 1244 (1st Cir., 1974).

The Court of Appeals for the Fourth Circuit sustained §1343(3) jurisdiction without comment in a §1983 action claiming a state AFDC program conflicted with the Social Security Act. Woolfolk v. Brown, 456 F.2d 652 (4th Cir., 1972). The Court retreated somewhat in Doe v. Lukhard, 493 F.2d 54 (4th Cir., 1974), reversing a clear finding of §1343(3) jurisdiction over a Supremacy Clause claim, Doe v. Lukhard, 363 F.Supp. 823 (E.D. Va. 1973). In so doing the Fourth Circuit decided to await a definitive resolution of the question reserved in King, supra, at 312 n.3. As noted above, however, the Court in Hagans, supra, at 533 n.5, again deferred decision on the question.

In Blue v. Craig, 505 F.2d 830 (4th Cir. 1974), the court clearly found §1343(3) jurisdiction over a "claim of an infringement by a state regulation on a right conferred merely by federal 'law'." 505 F.2d, at 834. After discussing at length the legislative history of 42 U.S.C. §1983 and 28 U.S.C. §1343, and the treatment of §1343(3) jurisdiction by the Second Circuit Court of Appeals, the Court rejected this Court's analysis, 505 F.2d, at 835 n.7, and 839-842, holding

that:

> Swift & Co. v. Wickham (1965) 382 U.S. 111, 125, had assumed "that a suit to have a state statute declared void and to secure the benefits of the federal statute with which the state law is allegedly in conflict cannot succeed without ultimate resort to the Federal Constitution -- ' to be sure any determination that a state statute is void for obstructing a federal statute does rest in the Supremacy Clause of the Federal Constitution'." Despite its reservation of decision, the Court by this language in its opinion, it would seem, has pointed inescapably to the conclusion "that the 'secured by the Constitution' language of §1343(3) should not be construed to exclude Supremacy Clause issues" and that a claim that a state statute or regulation is inconsistent with federal law poses a constitutional issue under the Supremacy Clause, jurisdictionally cognizable under §1343(3). This is such a case.
>
> Id., at 843-844.

B. The Legislative History of Sections 1983 and 1343(3) Demonstrates Congressional Intent to Authorize Section 1343(3) Jurisdiction over all Section 1983 Actions.

42 U.S.C. §1983 provides a cause of action for deprivation of rights secured "by the Constitution and laws." Its counterpart, 28 U.S.C. §1343(3), confers federal court jurisdiction over actions asserting deprivation of rights secured by the Constitution or "any Act of Congress providing for equal rights." Even absent plaintiffs' claim that jurisdiction exists under §1343(3) for a deprivation of their constitutional rights as protected by the Supremacy Clause, §1983 should not be so narrowly construed as to deny a cause of action based wholly on an inconsistency between state policy and federal law. Proper construction of the language and legislative history of both §1983 and §1343(3) would confer federal jurisdiction to consider a cause of action based upon a deprivation under "color" of state law of a right based

merely on a federal statute.

This Court has previously seized upon the difference in language between §1983 and §1343(3) to limit jurisdiction under 28 U.S.C.§1343(3) not to all §1983 actions for deprivations of rights secured by federal laws, but only to §1983 actions for deprivations of rights secured by federal laws providing for equal rights. See, e.g., McCall v. Shapiro, 416 F.2d 246, 249 (2d Cir. 1969); Rosado v. Wyman, 414 F.2d 170, 178 (2d Cir. 1969); Aguayo v. Richardson, 473 F.2d 1090, 1101 (2d. Cir., 1973).

§§1983 and 1343(3) originated in the Civil Rights Act of 1871, entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for Other Purposes." The 1871 Act did not create substantive rights, but rather created an enforcement mechanism to secure the rights and protections guaranteed by the Fourteenth Amendment. The wording of the predecessors of both §§1983 and 1343(3) were contained in a single section, §1 of the 1871 Act. Both district courts and circuit courts were given concurrent jurisdiction over §1 of the 1871 Civil Rights Act.

In 1875 Congress revised and consolidated the statutes, terming the result the "Revised Statutes." The primary aim was to restate the law, rather than add new provisions or delete existing ones. 2 Cong. Rec. 129 (1873); 2 Cong. Rec. 646-50, 825-58 (1874). Under the revision §1983's predecessor became 26 U.S.C. §1979, under the title "Civil Rights." Section 1343(3)'s predecessor was contained in §563(12), giving jurisdiction to district courts and §629(16), giving jurisdiction to circuit courts. §629(16)used the phrase

In the instant case, the appellees have

"providing for equal rights" while §563(12) did not, but both sections were cross-referenced to 26 U.S.C. §1979. No reason for the addition of the words "providing for equal rights" has ever been articulated. However, the cross-references demonstrate Congress's intent to give both district courts and circuit courts concurrent jurisdiction over all §1979 (later §1983) actions. This argument is reinforced by the merger of circuit court and district court jurisdiction in 1911. See, Blue, supra, at 837, where the Court held:

> Even though there was this difference in the language of the two jurisdictional sections, with the district court section being "identical" with the substantive provision and with the circuit court section including the additional phrase "providing for equal rights," there is no indication that, by such difference, with one jurisdictional statute referring to "civil rights" and the other to "equal rights," the Congress intended to make the jurisdiction in either the district of the circuit court over an action under §1983 any less than the full scope of the substantive provision itself and it perceived, it would seem, no difference in the actual application of the two jurisdictional sections, so far as §1983 was concerned. This conclusion is confirmed by the manner in which the Reviser arranged and cross-referenced the several substantive and jurisdictional provisions in this 1875 revision.

In 1911, Congress abolished the circuit courts, and returned jurisdiction to the district courts, while retaining the phrase "providing for equal rights."

There is nowhere any clear Congressional intent to limit §1343(3) jurisdiction to "equal rights" cases. To the contrary when the different wording appeared in the revised statutes of 1911, the Special Joint Committee on Revision and Codification discussed the predecessor of §1343(3), which used the present wording, in the following way:

> This paragraph merges the jurisdiction now vested in the district courts by paragraph 12 of section 563, and in the circuit courts by paragraph 16 of section 629, and vests it in the district courts.
> [S. Rep. No. 388, 61st Cong. 2d Sess., pt. 1, at 15 (1910).]
>
> The Committee added:
>
> The changes proposed by the bill are generally of form rather than substance. Where the substance of the laws would appear to be changed it is generally because of the reorganization and consolidation of the laws.
>
> Id.

It is obvious, therefore, that Congress intended the district courts to retain the jurisdiction over §1983 actions that was originally given, without limitation, by the Civil Rights Act of 1871. See, Blue, supra, at 838, where the Court held:

> And this, in our opinion, is the proper method of construing the term "equal rights" in this 1875 statement of the jurisdiction of the circuit courts -- not so much as a term limiting the scope of the statute but rather as a term intended to spread the jurisdictional umbrella of the federal courts over any actions authorized under statutes enacted to give effect to the Fourteenth Amendment, including specifically §1983.

Any other position would be illogical. To deny §1343(3) jurisdiction to plaintiffs would be to hold that Congress specifically intended to create a federal cause of action while providing no jurisdictional forum. This view is opposed by the commentators. See, Herzer, Federal Jurisdiction Over Statutorily-Based Welfare Claims, 6 Harv. Civ. Rights - Civ. Lib. L. Rev. 1 (1970); Cover, Establishing Federal Jurisdiction in Actions Brought to Vindicate Statutory (Federal) Rights When No Violations of Constitutional Rights are Alleged, Clearinghouse Rev. 5 (Feb.-Mar. 1969); Note, Section 1983: A Civil Remedy for the Protection of Federal Rights,

39 N.Y.U.L. Rev. 839 (1964); Note, Federal Jurisdiction Over Challenges to State Welfare Programs, 72 Colum. L. Rev. 1404 (1972); LaFrance, Federal Litigation for the Poor, 1 Ariz. State U.L.J. 1 (1972).

The Supreme Court agrees. In Lynch v. Household Finance Corp., 405 U.S. 538 (1972), the Court discussed the history of the Civil Rights Act of 1871, the predecessor of both §§1983 and 1343(3), and concluded:

> Despite the different wording of the substantive and jurisdictional provisions, where the §1983 claim alleges constitutional violations, §1343 (3) provides jurisdiction and both sections are construed identically.
>
> Lynch, supra, at 543 n.7.

The Court in Lynch further held that:

> The Congress that enacted the predecessor of §§1983 and 1343(3) seems clearly to have intended to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law.
>
> Id., at 429.

Plaintiffs in the instant case have stated just such a claim, to redress the deprivation by state officials acting pursuant to state policy of their propriety rights to welfare benefits under the Social Security Act.

Their §1983 action is, therefore, jurisdictionally cognizable under §1343(3).

C. The Supreme Court Has Eliminated the Personal Right-Property Right Distinction in Section 1983 Actions Brought Under 28 U.S.C. §1343(3).

In McCall v. Shapiro, 416 F.2d 246 (2d. Cir., 1969), this Court rejected jurisdiction over Supremacy Clause claims

under 28 U.S.C. §1343(3). A primary reason advanced by the McCall court was the limitation of 28 U.S.C. §1343(3) jurisdiction to unconstitutional infringement of individual rights.

> It is reasonably clear then that Section 1343(3) and (4) dealing with statutes providing for "equal rights" and "civil rights" were aimed at questions of personal liberty rather than property matters, and that the latter are relegated to the general provisions of 28 U.S.C. §1331(a).
>
> McCall, supra, at 250.

Since the claim to welfare benefits is grounded in the Social Security Act, no "personal" right is at stake, and the application of the holding in McCall would bar §1343(3) jurisdiction to consider such claims. See, e.g., Tichon v. Harder, 438 F.2d 1396 (2d Cir. 1971).

The Supreme Court eliminated the personal right-property right distinction in Lynch v. Household Finance Corp., 405 U.S. 538 (1972), revg., 318 F. Supp. 1111 (D. Conn. 1971), holding at 542:

> This Court has never adopted the distinction between personal liberties and proprietary rights as a guide to the contours of §1343(3) jurisdiction. Today we expressly reject that distinction.

Therefore, this Court's premise for its holding in McCall, supra, and its progeny, must now be questioned. See, Johnson v. Harder, 438 F.2d 7 (2d Cir., 1971). A suit to enforce claims to benefits provided by the Social Security Act must now be jurisdictionally equated with a suit to enforce individual rights.

A suit such as the instant one, aimed at securing for for plaintiffs and their class benefits to which they are

entitled under the Social Security Act, cannot be dismissed for want of jurisdiction on the basis of McCall, supra, because the Social Security Act is not a statute providing for equal rights. Section 1343(3) gives the federal courts jurisdiction over a claimed deprivation of rights "secured by . . . any Act of Congress providing for equal rights . . . ." The Act of Congress which provides equal rights to the plaintiffs herein is 42 U.S.C. §1983, not the Social Security Act. Plaintiffs' cause of action, therefore, derives from §1983, and not from the Social Security Act. The question, discussed at length by this Court in McCall v. Shapiro, supra, Rosado v. Wyman, supra, and Aguayo v. Richardson, supra, whether nor not the Social Security Act is an act providing equal rights or civil rights, is hence irrelevant. See, Blue, supra, at 842.

Laws such as the Social Security Act secure rights and privileges to citizens. Where such rights and privileges are deprived by state officials acting under color of state law a right of action to redress the deprivation is provided by §1983. Plaintiffs in this action have stated just such a cause of action as is authorized by §1983.

D. The Supreme Court Has Implicitly Encouraged the Initiation of Actions in Federal Courts to Redress Deprivations of Statutorily Guaranteed Benefits.

In Rosado v. Wyman, 397 U.S. 397, 422 (1970), the Court held:

> . . . While we view with concern the escalating involvement of federal courts in this highly complicated area of welfare benefits, one that should be formally placed under the supervision of HEW, at least in the first instance, we find not the slightest indication that Congress meant to deprive federal courts of

> their transitional jurisdiction to hear and decide federal questions in this field.

See also Zwickler v. Koota, 389 U.S. 241, 248 (1967), where the Court stated:

> In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '. . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States.

Thus, the Supreme Court has implicitly encouraged assumption of §1343(3) jurisdiction. See also, the cases cited in Section II A of this brief, supra.

The fact that the Supreme Court has not discouraged §1343(3) jurisdiction over welfare cases is crucial, for without such jurisdiction, welfare recipients would be left without a forum. 42 U.S.C. §604 gives the Secretary of Health, Education & Welfare power to hold a conformity hearing to determine if a state welfare department's practices conform to federal law. However, welfare recipients have no standing to initiate conformity hearings, although they may participate in hearings initiate by HEW. 42 U.S.C. §604; 45 C.F.R. §§213.23(f) and 213.25(a); see also, N.W.R.O. v. Finch, 429 F.2d 725 (D.C. Cir., 1970). In Rosado v. Wyman, supra, at 406, the Court encouraged federal courts to assume jurisdiction over welfare cases, since welfare recipients could not obtain an administrative ruling from HEW or participate in HEW's review process.

Plaintiffs argue that this Court should accept §1343(3) jurisdiction over welfare cases when there is a claim that a state statute or regulation conflicts with the Social

Security Act in violation of the Supremacy Clause. By assuming §1343(3) jurisdiction over Supremacy Clause actions, federal courts will have an opportunity to measure a State's Welfare program in light of Congressional intent as expressed in the Social Security Act, rather than in light of the State's purposes.

In such cases, there must be a claim of conflict between a state law or regulation and the Social Security Act. See, e.g., Carleson v. Remillard, supra, at 601. Also, there must be a clear Congressional intent that "a federal statute was intended to supersede the exercise of the powers of the state . . . ." Schwartz v. Texas, 344 U. . 199, 202 (1956). Finally, a Supremacy Clause claim must meet the test of substantiality as must any other constitutional claim. See, Sections I and II E of this brief. Not every action will satisfy these requirements. Where the tests are met, as in the instant case, jurisdiction must be found under 28 U.S.C. §1343(3).

E. The District Court Has Jurisdiction Under 28 U.S.C. §1343(3) to Consider Appellants' Supremacy Clause Claims which Are Not Insubstantial.

As with more traditional constitutional claims, those predicated upon the Supremacy Clause must be "substantial" to confer jurisdiction pursuant to 28 U.S.C. §1343(3). Thus in Wells v. Malloy, ___F.2d___ (2d Cir. Jan. 23, 1975), this Court applied the substantiality doctrine as enunciated in Goosby v. Osser, supra, in an action claiming jurisdiction under 28 U.S.C. §1341. Following a determination that the appellants' claims were not rendered inescapably frivolous by the Supreme

Court decision in United States v. Kras, the action was remanded to the district court with instructions to request the convening of a three-judge court. Wells, supra, slip opinion, at 1418.

The same tests of insubstantiality which govern appellants' Fourteenth Amendment claims, and which were applied to the action brought under 28 U.S.C. §1341 in Wells, supra, must also be extended to appellants' supremacy clause claims herein. Appellants have alleged that Connecticut's redetermination policy violates provisions of the Social Security Act and regulations issued pursuant thereto. Existing case law neither confirms nor refutes appellants' Supremacy Clause claims, nor can these claims be considered "essentially fictitious," "obviously frivilous," or "wholly insubstantial." The following examination of each of appellants' Supremacy Clause claims supports their contention that these claims are not insubstantial under the tests in Goosby, supra, and Hagans, supra.

1. Appellees' redetermination policy requiring a face-to-face interview every six months violates sections 406(b)(1) and (2) and 402(a)(10) of the Social Security Act.

In Count One of the Complaint, appellants alleged that appellees' redetermination policy violates the Social Security Act's prohibitions on grant restriction and requirements that aid be provided with reasonable promptness. Federal regulations issued pursuant to the Social Security Act require that a state's

> Standards and methods [for redetermination of eligibility be] consistent with the objectives of the programs, and . . . the rights of individuals under the

> United States Constitution, the Social Security Act . . . and State laws.
>
> 45 C.F.R. §206.10(a)(10); see also, Handbook of Public Assistance Administration, Part IV, at 2220.

Appellants first contend that redetermination interviews at district offices restrict the use of their assistance grant in violation of §406(b)(1) and (2) of the Social Security Act, 42 U.S.C. §606(b)(1) and (2). Appellants allege that they are compelled to expend a portion of their assistance grant in order to satisfy a condition of continuing eligibility -- an appearance once every six months in a designated district office for a personal interview. For appellants and the class they represent, this appearance necessitates a regular expenditure for travel and/or child-care costs which are not reflected in their assistance grant. Moreover, this restriction on the appellants' use of their assistance grants, violates other requirements of the Social Security Act which mandate consistent and equitable eligibility conditions. 45 C.F.R. §233.20(a)(iv), (a)(vii), and (a)(viii).[8] The consequence of appellees'redetermination policy is the total termination of assistance to appellants and the class they represent.

---

[8] A close reading of 45 C.F.R. §§206 and 233.10 makes it clear that these provisions apply to redeterminations of continuing eligibility as well as to the determination of initial eligibility.

The appellants' second claim in Count One is that the appellees' redetermination policy violates §402(a)(10) of the Social Security Act, 42 U.S.C. §602(a)(10), which provides that the time requirements for redetermination procedures must not be utilized as a method for denying assistance. The redetermination of eligibility must occur " . . . not less frequently than every 6 months in AFDC . . ." 45 C.F.R. §206.10 (a)(9)(iii). However, ". . . the agency's standard of promptness for . . . redetermining eligibility shall not be used . . . as a basis . . . for terminating assistance." 45 C.F.R. §206.10 (a)(3)(ii). The appellees' redetermination time guidelines found in Exhibit A to the Complaint (A.20), clearly require a termination of assistance. Since HEW considers reasonable promptness in furnishing aid to extend to the corrollary prohibition or terminations, the appellees' redetermination policies appear to directly contradict the provisions of 45 C.F.R. §206(10)(a)(3)(iii).

Appellants' allegations in Count One are clearly not insubstantial. The exact issues raised in these Supremacy Clause claims have not been previously foreclosed from consideration by the Supreme Court nor have they been rendered "inescapibly" frivolous. Goosby, supra.

2. Appellees' redetermination policy violates section 402(a)(1) of the Social Security Act and the federal regulations promulgated thereunder which mandate statewide uniformity.

Section 402(a)(1) of the Social Security Act, 42 U.S.C. §602(a)(1),and regulations promulgated thereunder clearly require that a State Plan for assistance be in effect in all

political subdivisions of the State, and that the state's standards of eligibility and methods of determining eligibility be uniform in order to eliminate irrational interstate differences in the amounts of assistance paid to equally needy individuals. 45 C.F.R. §§205.120(a)(1), 205.130(a), and 206.10(a); see also, Handbook of Public Assistance Administration, Part II, Index No. 4300 (Aug. 25, 1964).

Appellants argue that the state's policy for redetermination violates these provisions of the Social Security Act requiring state-wide uniformity by not providing adequate offices for redetermination interviews and by creating a situation where the benefits of the AFDC program are not equally available to all eligible persons.

Appellees asserted that their redetermination policy provisions were enacted in the interest of administrative efficiency and followed federal guidelines in 45 C.F.R. §206.10(a). In addition, they contend that a face-to-face redetermination interview at the district office is required in response to HEW's directives to reduce their error rates. These requirements have been fully set forth in 38 Fed. Reg. 8743 (April 6, 1973), as modified by 39 Fed. Reg. 37195, (October 18, 1974), establishing final regulations for the "Quality Control System and Federal Financial Participation in Erroneous State Payments Under Title IV-A." 45 C.F.R. §§205.40 and 205.41.

The appellants contend that the appellees have improperly equated "Redetermination of Eligibility" and "Quality Control" requirements in a manner which has resulted in inequitable standards of administration. The hardships imposed upon the

plaintiff class have been adequately set forth in the complaint and affidavits. (A.2-3, 6-12). The monetary differential is only the most obvious element of inequitable treatment. The absence of accessible public transportation, child-care facilities, and accessible district offices cannot be so easily disregarded in view of the Social Security Act's purpose to assist needy dependent children. The uniformity provisions become meaningless if they are not viewed in this context. The regulations cited above thus contemplate that public assistance plans must be characterized by statewide uniformity so that all recipients will receive the same treatment at the hands of the public assistance system regardless of their place of residence. See, Rothstein v. Wyman, 303 F.Supp. 339, 350-351 (S.D.N.Y. 1969), vacated and remanded, 398 U.S. 275 (1970), on remand, 336 F.Supp. 328 (S.D.N.Y. 1970); Boddie v. Wyman, 434 F.2d 1207, 1211-1212 (2d Cir. 1970).

Moreover, it is apparent that the appellees' attempts to place the burden of reducing errors on the appellants through this redetermination policy directly contradicts Manuals issued by HEW, entitled Quality Control in AFDC (Social and Rehabilitation Service No. 74-04010, Revised Jan. 1974). The Manuals clearly define quality control as the management process designed to identify and reduce errors through statewide sample of cases. See, Section 1, entitled "Objectives and Administration," at 1. (emphasis supplied).

Personal interviews of clients are only required for those cases included in the sample. Id., at 3. "As a rule, the interview will be held in the home, but the client may request that it be held elsewhere." See, id., Section 3,

entitled, "Case Review Process," at 5. The development of a corrective action plan to reduce errors should only use personal interviews selectively. See, id., section 5, entitled "Decision Making Process for Corrective Action," at 15-16.

The appellants' claims that the appellees' redetermination procedures are in violation of the Social Security Act and must be found invalid under the Supremacy Clause can hardly be viewed as "essentially fictitious" or "wholly insubstantial." The concept of "statewide operation" and the principles of equal treatment have been repeatedly emphasized in the Social Security Act and subsequent amendments thereto, regulations promulgated by HEW, and the legislative history of the Act.

Nor have prior decisions of the Supreme Court foreclosed consideration of these claims. See, e.g., Rosado v. Wyman, 397 U.S. 397 (1970). In Dublino v. New York State Department of Social Services, 348 F.Supp. 290 (W.D.N.Y. 1972), the plaintiffs raised the issue of state-wide uniformity with regard to the check pick-up requirement of the New York Work Rules. They asserted that this requirement reduced their amount of payment by creating an item of need --travel expenses -- not reflected in the state-wide standard. On appeal, the Supreme Court at 413 U.S. 405 (1973), reversed the lower court's determination that federal law was preemptive over state law on this issue and remanded the action for further consideration of the statutory claims. 413 U.S. 405 (1973). The Supreme Court, by remanding the statutory claims in Dublino, avoided a determination of the boundaries of statewide operation within the meaning of the Social Security Act.

In conclusion, the appellants contend that their Supremacy Clause claims present "substantial" constitutional questions and that §1343(3) jurisdiction should be conferred to consider these issues.

III. THE DISTRICT COURT HAS JURISDICTION OVER APPELLANTS' CLAIMS OF SOCIAL SECURITY ACT VIOLATIONS UNDER 28 U.S.C. §1343(4).

28 U.S.C. §1343(4) provides in part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . .
>
> (4) to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of Civil rights, including the right to vote.

An action alleging that under color of state law certain federal statutes or regulations are being violated may state a cause of action under 42 U.S.C. §1983, and thus confer jurisdiction under §1343(4), even absent allegations of constitutional invalidity. Gomez v. Florida State Employment Service, 417 F.2d 569 (5th Cir. 1969). The Gomez Court relied on the Supreme Court's statement in Peacock v. City of Greenwood, 384 U.S. 808, 829-830 (1964), that:

> Under 42 U.S.C. §1983 . . . the officers may be made to respond in damages not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and statutory rights as well.
>
> Gomez, supra, at 579, citing Peacock (emphasis supplied).

In Hall v. Garson, 430 F.2d 430, 438 (5th Cir. 1970), the court reiterated its previous holding that "§1983 is an 'Act of Congress providing for the protection of civil rights, including the right to vote'."

In the instant case, the appellants have met the jurisdictional test by alleging that the appellees are acting "under color of state law" to deny plaintiffs their rights to: assistance without restrictions on the use of their grant; assistance granted with reasonable promptness; and have the assistance plan assure state-wide uniformity of treatment of equally needy eligible persons.

Several federal courts have already found §1343(4) jurisdiction in §1983 actions which claim statutory violations. In Giguere v. Affleck, 370 F.Supp. 154 (D.R.I. 1974), the plaintiffs, as in Gomez, supra, were attempting through judicial remedies to secure for themselves the fundamentals of human dignity, i.e., the same right to be free from hunger and malnutrition at issue in the instant case. Chief Judge Pettine reasoned that:

> [A] narrower approach to the scope of federal civil rights jurisdiction might leave certain individuals without a federal forum in which to seek redress when, under color of state law, they are deprived of rights aimed at securing basic human needs which the Congress in its wisdom had seen fit to protect.
>
> Giguere, supra, at 158.

Although Giguere was not appealed, the same district court found §1343(4) jurisdiction over an action against a state welfare director's denial of Social Security Act benefits in a welfare"flat grant" system. Roselli v. Affleck, 373 F. Supp. 36 (D.R.I. 1974). The Court in Roselli relied on Giguere for its jurisdictional finding, which was affirmed. ___F.2d___, Docket No. 74-1084 (1st Cir.Dec. 31, 1974); see also, Blue v. Craig, 505 F.2d 830 (4th Cir. 1974); Anderson v. Graham, 492 F.2d 986 (8th Cir. 1973); Bass v. Rockefeller,

331 F.Supp. 945, 949, n.5 (S.D.N.Y. 1971), appeal dismissed as moot, 464 F.2d 300 (2d Cir. 1971); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); McClellan v. University Heights, Inc., 338 F.Supp 374 (D.R.I. 1972); Worrell v. Sterett, 1 CCH Pov. Rep., para. 1045.101 (D. Ind. 1970).

This Court has, however, held to the contrary on the question of §1343(4) jurisdiction. McCall v. Shapiro, supra; Aguayo v. Richardson, 473 F.2d 1090, 1101 (2d Cir. 1973), cert. denied, 410 U.S. 921 (1973). In Blue v. Craig, supra, the Fourth Circuit in reviewing the decision in McCall, stated at 842:

> The difficulty with the conclusion [in McCall] s that it overlooks the fact that, while the alleged illegality of the deprivation complained of finds its warrant in the Social Security Act, the actual cause of action is granted not by the Social Security Act but by §1983, which is historically and textually a "civil rights" Act.

Appellants, therefore, request this Court to review its decision in McCall, and find that jurisdiction exists under §1343(4) over their statutory claims.

CONCLUSION

The Court should hold that the complaint herein presents substantial constitutional questions and the district court had jurisdiction of this case pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343. The judgment of the court below should be reversed, and the case remanded to that court for further proceedings.

Respectfully submitted,

JAMES C. STURDEVANT
MARY ANN CONKLIN
Tolland-Windham Legal
Assistance Program, Inc.
35 Village Street
P. O. Box 358
Rockville, Connecticut 06066

CHARLES A. PIRRO, III
Fairfield County Legal Services
Inc.
33 South Main Street
South Norwalk, Connecticut 06854

DAVID B. SPANIER
Legal Aid Society of Hartford
County
525 Main Street
Hartford, Connecticut 06103

Attorneys for Plaintiffs-Appellants

CERTIFICATION

I hereby certify that I mailed a copy of the foregoing Brief of Plaintiffs-Appellants together with a copy of the Joint Appendix by depositing the same in the United States mails, postage prepaid, this 6th day of March, 1975, to:

Francis J. MacGregor, Esquire
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut 06114

James C. Sturdevant

Attorney for Plaintiffs-Appellants